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THE NATURE OF THE RIGHTS OF THE *CESTUI QUE TRUST.*

If a trustee should destroy the trust *res,* or should sell it to a purchaser without notice of the trust and dissipate the purchase money, the *cestui que trust* may maintain a suit in equity against the trustee for breach of trust, and recover a sum of money, either the value of the trust *res,* or the amount of profits which should have accrued if no breach had been committed. His right is a personal right against the trustee; it is an equitable obligation. But while a trustee still holds the trust *res* the right of the *cestui que trust* is of a different nature. On the question how far it is different there is a great diversity of opinion. On the one side there are lined up Coke and his great train of disciples, together with Langdell and Ames, Maitland and Holland, and the leading commentators on the law of uses and trusts, Sanders, Gilbert and Lewin. In the other camp are to be found Austin and Salmond and Pomeroy, whose views have recently been ably championed by Professor Huston.[1] Occasionally some heat is engendered in the conflict of opinion. Professor Maitland allows himself the luxury of an almost Austinian vigor of expression when he says of Austin's contention that in equity a specifically enforceable contract to sell property at once vests *jura in rem* or ownership in the buyer: "As a piece of speculative jurisprudence this seems to me nonsense, while as an exposition of our English rules, I think it not merely nonsensical but mischievous."[2] It is the purpose of the writer briefly to outline the arguments on each side of the question.

The creation of a use or trust has always been regarded as a legal transaction quite different from the creation of a contract.

[1] Enforcement of Decrees in Equity, ch. 6.

[2] Lectures on Equity, 111.

In the *first* place, when property is transferred by one person to another to the use of or in trust for a third person, there is not and there never has been any doubt of the right of that third person to enforce the use or trust, whereas there is a dispute as to the right of the beneficiary of a contract to enforce the contract; and the creator of a use or trust in favor of a third person cannot enforce the use or trust, whereas a party to a contract certainly has a right to enforce it.[3] The transaction is regarded, in substance, as a grant or conveyance of the beneficial interest rather than as the creation of an obligation. *Secondly,* in spite of the fact that in the creation of a use or trust there are often found all the elements which are found in the creation of a contract, nevertheless an action at law for breach of contract will not lie against one who holds subject to a use or trust. It has been suggested that the reason for this is that equity gave relief before the action of special assumpsit arose, and that when that action did arise, it was not applied to uses or trusts because the law judges thought it unnecessary to give a remedy in a field adequately preëmpted by equity.[4] But the courts of law have seldom shown such self abnegation as to refuse to give relief merely because relief, even more adequate relief than the courts of law could give, was given across the Hall. Moreover, the action of covenant long antedated the enforcement of uses and yet no case has been found in which the feoffor to uses obtained relief in this form of action.[5] No, the truth seems to be that the creation of a trust has been regarded rather as a grant of a beneficial interest than as the creation of an obligation. No one has stated this idea more succinctly than Professor Ames when he says "The bargain and sale of a use, as well as the agreement to stand seised, were not executory contracts, but conveyances."[6] *Thirdly,* for the last hundred years it has been held that a trust may be created by a gratuitous declaration of trust without transfer of the legal title.[7] Here again the reason, it is submitted, is that the courts regard the transaction as a transfer of a beneficial interest rather than as the creation of an obligation. Of course these three propositions do not conclusively show the

[3]Of course there may be a question whether he can obtain specific performance, and whether in an action at law he can recover more than nominal damages.

[4]Maitland, Lectures on Equity, 115.

[5]Ames, Lectures on Legal History, 236.

[6]Lectures on Legal History, 148.

[7]*Ex parte* Pye (1811) 18 Ves. 140.

character of the right of the *cestui que trust.* In the early law the distinction between a grant or conveyance and the incurring of an obligation was not understood; a debt, for instance, seems to us today to be a clear example of a mere obligation, and yet in the early law the creation of a debt was regarded as in the nature of a grant.[8] But these propositions do tend to show that the courts have viewed the right of the *cestui que trust* as something different from a mere obligation, something at least resembling an interest in property.

In dealing with what Professor Maitland has called the "internal" character of equitable interests, that is, their duration, transmission and alienation, the courts of equity have always treated them as more like interests in property than obligations. The principle on which the courts of equity have proceeded is that "equity follows the law".[9] This maxim means not that equity treats an equitable interest in property as the law treats an obligation or chose in action, but rather that equity treats an equitable interest in property as the law treats a legal interest in that property. The interest of the *cestui que use* was held to be assignable even in those early days when to assign a chose in action was illegal on the ground of maintenance.[10] As early as the middle of the fifteenth century it was held that if the *cestui que use* dies intestate, his interest in the trust *res* descends in the same way in which the legal interest in the *res* would have descended.[11] But this principle that equity follows the law, that equity applies to equitable interests in property the rules applied by the law to legal interests in the property, has not always been fully accepted or consistently applied. Indeed one of the chief purposes for which uses were invented was to evade rules of law; as for example the rule which forbade devises of land. The courts of equity have had a great reforming influence upon the law of property largely because they

[8]See Ames, Lectures on Legal History, 88, 148.

[9]Another maxim to which resort is sometimes had, particularly in cases of specifically enforceable contracts of sale, and testamentary directions for conversion, is that "equity regards that as done which ought to be done." Langdell, Summary of Equity Pleading (2nd ed.) 211. Of course in reality equity does no such thing; if it did it would never be necessary to order anything to be done. The idea usually intended to be expressed is that equity considers that one who has a right to certain property should be regarded, for some purposes at least, as having an equitable interest in the property analogous to the legal interest of a legal owner of the property.

[10]See Doctor & Student, Dialogue II, c. 22 (1523); Y. B. 27 Hen. VIII., fol. 8, pl. 22 (1535).

[11]Y. B. 5 Ed. IV., fol. 7, pl. 16 (1465), (tenancy in borough English).

have not in all matters followed the law. Equity, looking to the substance rather than to the form, has dispensed with many of the formalities which were dear to the heart of the law; equity has refused to follow antiquated feudal conceptions founded upon reasons which had begun to lose their meaning when equitable interests first arose; and equity has refused to follow conceptions based upon that metaphysical pseudo-logical sort of reasoning so common in medieval law as well as in medieval theology and science. Although equity followed the law so far as to create equitable estates in land, yet the old rules forbidding an overlapping or an hiatus in estates were ignored by equity in so far as it allowed springing and shifting uses. Again, equity did not regard a *cestui que use* or *cestui que trust* in fee simple as holding of an overlord. It followed, therefore, that such feudal burdens as relief, fine upon alienation, wardship and marriage were not imposed upon him. And this is the reason why when the *cestui que use* or *cestui que trust* died without an heir the feoffee or trustee was allowed to keep the land; for there was no equitable overlord to take the equitable interest by escheat.[12] Many legal rules, which might well have been applied to equitable interests, for a long time were not so applied. The legal rules as to curtesy and dower for instance were not applied to uses, nor were the creditors of the *cestui que use* able to reach his interest. But when the modern trust grew up from the ashes of the old use, which was so nearly consumed by the Statute of Uses, the doctrine that equity follows the law was given a new impetus. It was seen that the Chancellor ought not to deal capriciously with equitable interests, that such interests should be governed by definite rules; and it came to be held that the interest of the *cestui que trust* is so little like a mere

[12]Burgess *v.* Wheate (1759) 1 W. Bl. 123; s. c. 1 Eden, 177; Taylor *v.* Haygarth (1844) 14 Sim. 8. See Ames, Lectures on Legal History, 197. True, there is a doctrine that personal property without an owner goes to the Crown as *bona vacantia*, and equity has applied this doctrine to equitable interests in personal property; and conceivably equity might have extended the doctrine to equitable interests in land; but at common law there was no such general doctrine in the case of ownerless land, as is shown by the fact that when a tenant *pur auter vie* died before the *cestui que vie* the ownerless interest did not pass to the Crown, but any one might come and seize it. But a forcible argument for the existence of a doctrine that vacant lands go to the Crown is advanced in Hardman, The Law of Escheat, 4 Law Quarterly Review, 318, 330-6. The rule that the trustee may keep the land when the *cestui que trust* dies without heirs has been changed by statute in England (Intestates Estates Act, 1884); and in the United States the state is held to be entitled either on the ground of the substitution of allodial ownership for tenure, or on the ground of an extension to land of the rule as to *bona vacantia*.

chose in action, and so much like a property interest that husbands were given curtesy and rights during coverture corresponding to those which they would have had in the legal estate;[13] and although wives were not given dower in equitable estates it was only because of the doctrine of *stare decisis,* and this anomaly was finally removed by statute in England and generally in the United States. Creditors of the *cestui que trust* were also ultimately given rights in the equitable interests of the *cestui que trust,* both before and after his death, corresponding to those which they had in his legal interests.

This view, that the interest of the *cestui que trust* in its "internal" aspect is more like an interest in property than an obligation, has found a modern application in a recent decision of the Supreme Court of the United States. In *Brown* v. *Fletcher,*[14] the facts were these: a trustee and *cestui que trust* were both citizens of the State of New York; the *cestui que trust* assigned his beneficial interest to a citizen of Pennsylvania, who brought suit against the trustee for the enforcement of the trust in the federal district court for the Southern District of New York. Now the federal statute[15] provides that no district court shall have cognizance of any suit to recover upon any chose in action in favor of any assignee, unless such suit might have been prosecuted in such court if no assignment had been made. The Supreme Court was unanimously of the opinion that the district court had jurisdiction. The assignment of the interest of the *cestui que trust* is not the assignment of a chose in acton.

In respect, then, of the acquisition of rights of third parties in it, the interest of the *cestui que trust* has certainly come to be regarded as a property interest and not a mere obligation. "We may well say", Maitland admits, "that a *cestui que trust* has rights which in many ways are treated as analogous to true proprietary rights, to *jura in rem*".[16] But he contends that, nevertheless, they are not really such.

Has the *cestui que trust* really rights *in rem?* A right *in rem* is usually defined to be a right available against the world at large, corresponding to a duty imposed upon the world at large; and by the world at large is meant indeterminate persons, an indefinite

[13]With one great exception, namely, that of the married women's separate equitable estate.

[14](1915) 235 U. S. 589, 35 Sup. Ct. 154.

[15]Jud. Code (1911) § 24, 36 Stat. 1091.

[16]Lectures on Equity, 115.

number of persons, not necessarily every one in the world; and it is to be distinguished from a right *in personam,* or obligation, which is a right available against determinate persons, corresponding to a duty imposed upon determinate persons.[17] Now a legal obligation is the subject of ownership. It is the property of the obligee. If a third person intentionally and without excuse interferes with this property, he commits a tort and lays himself open to an action for damages. "The general duty resting upon all mankind not to destroy the property of another, is as cogent in favor of an obligee as it is in favor of the owner of a horse. And the violation of this duty is as pure a tort in the one case as in the other."[18] This is the doctrine of *Lumley* v. *Gye,*[19] and *Bowen* v. *Hall.*[20] An obligee has, then, a right *in personam* against the obligor; and he has in addition rights *in rem,* for he may insist that all the world refrain from interfering intentionally and without excuse with his right against the obligor. The creation of a right *in personam* necessarily results in the creation of rights *in rem.* And of course an equitable obligation as clearly as a legal obligation, is the subject of ownership. It is the property of the obligee. If a third person intentionally and without excuse interferes with this property he lays himself open to a suit for damages. An equitable obligation, of course, is protected only in equity; a third person who interferes with it is guilty of an equitable rather than a legal tort. It is true, therefore, that the *cestui que trust* has not merely rights *in personam* against his trustee, but also rights *in rem,* rights which may be asserted against the world. The disputable question, therefore, is not as to the existence of his rights *in rem,* but as to their extent.

Professor Langdell in speaking of an equitable right says that such a right is not ownership; "that is", he adds, "it is not ownership of the thing which is the subject of the obligation. For example, when land is held by one person for the benefit of another, the latter is not properly owner of the land even in equity. Of course the equitable obligation itself is as much the subject of ownership as is a legal obligation."[21] And he further says, "It may be said that equity could not create rights *in rem* if it would,

[17]See Salmond, Jurisprudence (5th ed) § 81.

[18]Ames, Lectures on Legal History, 262.

[19](1853) 2 E. & B. 216.

[20](1881) 6 Q. B. D. 333. The limits of the doctrine have not yet been worked out.

[21]Brief Survey of Equity Jurisdiction (2nd ed.) 5, note.

and that it would not if it could", and adds "Here again, when it is said that equity cannot create rights *in rem,* reference is had to the *res,* which is the subject of the equitable obligation. Regarding the equitable obligation itself as the *res,* there can be no doubt that an equitable obligation, like a legal obligation, always creates a right *in rem* (*i. e.,* an absolute right), as between the obligee and all the rest of the world except the obligor; for it can create a right *in personam* (*i. e.,* a relative right) only as between the obligee and the obligor. To say, therefore, that an obligation can create a relative right *only,* is to say that it can create no right whatever, except as between the obligee and the obligor. Moreover, if an obligation does not create an absolute right, it is impossible to support *Lumley* v. *Gye* and *Bowen* v. *Hall,* though the converse does not necessarily follow."[22] And in another place he says: "It is only by a figure of speech that a person who has not the legal title to property can be said to be the equitable owner of it: What is called equitable ownership or equitable title or an equitable estate is in truth only a personal claim against the real owner."[23]

Now it is just here that the difference of opinion arises. It is submitted that the *cestui que trust* is not merely the owner of the equitable obligation of the trustee, but he is also the equitable owner of the property held by the trustee. It is submitted that he has more than those rights *in rem* which are possessed by every obligee of a legal or equitable obligation; that he has also proprietary rights in the trust property. It is submitted that the legal analogue is not a legal obligation but legal ownership of property; and that to speak of equitable ownership is just as accurate a use of terms as to speak of legal ownership.

Four reasons have been urged as conclusively showing that the right of the *cestui que trust* is only an obligation and not a property right: *first,* that the trustee is owner and that there cannot be conflicting rights of ownership in the same property; *second,* that equity acts upon the person; *third,* that the duties of the trustee are positive as well as negative; and *fourth,* that a purchaser for value and without notice takes free and clear of the trust.

I. Professor Ames has said that it is clearly inaccurate to say that the *cestui que trust* is the equitable owner of the trust prop-

[22]Brief Survey of Equity Jurisdiction (2nd ed.) 6, note.

[23]Summary of Equity Pleading (2nd ed.) 210-11. For the same view see Ames, Lectures on Legal History, 289. "The use of the words 'equitable ownership' and 'equitable estate' is so inveterate among lawyers that we do not always remember that these are figurative rather than exact legal terms."

erty, because the trustee is the owner "and, of course, two persons with adverse interests cannot be owners of the same thing."[24] Professor Maitland suggests that the *cestui que trust* cannot be regarded in equity as the owner of the trust property, because the law regards the trustee as the owner and it would be inconceivable chaos, "civil war and utter anarchy", if law and equity should conflict.[25] Now it is probably true that law and equity sometimes do conflict.[26] But do they really conflict in this particular case? Is it not really the fact that both law and equity regard the trustee as the legal owner, and that both law and equity regard the *cestui que trust* as the equitable or beneficial owner?[27] Of course the question who is equitable or beneficial owner is not generally one with which a court of law is concerned. But even in Bacon's day a court of law did sometimes concern itself with that question, and when it did it recognized that it was the *cestui que trust* who is the beneficial owner.[28] To be sure, at first equity did not like to call the *cestui que trust* an owner of any kind, for equity was assisting in the evasion of rules of law which imposed burdens or restrictions upon ownership. "Once say *cestui que trust* is really owner", says Maitland,[29] "it follows that he cannot make a will, and on his death reliefs, wardships and so forth must follow." But when at length it was definitely determined how far equity should go in following the law, what legal principles are properly applicable to equitable interests and what are not, when the law of trusts became that "noble, rational and uniform system" of which Lord Mansfield speaks,[30] there ceased to be any practical objection to calling the *cestui que trust* equitable owner, and courts of equity came more and more to speak of the *cestui que trust* as having equitable ownership. And today, it is submitted, this is a perfectly proper use of terms, and one which accurately expresses the nature of his rights.

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[24]Lectures on Legal History, 262.

[25]Lectures on Equity, 17.

[26]See an interesting discussion of this matter by Professor Hohfeld, The Relations between Equity and Law, 11 Michigan Law Rev. 537.

[27]Indeed, there may be a legal beneficial interest separate from legal title. In the case of a conditional sale the buyer is the beneficial owner of the property although the legal title is in the seller, and yet the buyer's rights are legal and not equitable. Williston, Sales, § 330: "In fact the buyer acquires not simply a contract right but a property right."

[28]Bacon, Reading on Statute of Uses, *7.

[29]Lectures on Equity, 32.

[30]Burgess *v.* Wheate (1759) 1 W. Bl. 123, 160.

II. "Equity acts upon the person." By a judgment at law the plaintiff is usually declared to have a certain right; by a decree in equity the defendant is usually ordered to act, or to refrain from acting, in a certain way. A judgment at law is usually enforced without the coöperation of the defendant; if by the terms of the judgment the plaintiff is declared entitled to specific property the sheriff puts him in possession of that property; if by the terms of the judgment the plaintiff is entitled to recover a certain sum of money the sheriff seizes the defendant's property and sells it and out of the proceeds pays the plaintiff the amount to which he is entitled. On the other hand, a decree in equity is usually enforced by imprisoning the defendant and thereby making things so disagreeable for him that he will generally choose ultimately to obey rather than continue to suffer the disagreeable consequences of his disobedience. But the defendant may sometimes be imprisoned on his failure to satisfy a judgment at law; and on the other hand by writs of sequestration and by writs of assistance the Chancellor may enforce his decree by dealing with the possession of or even to a certain extent with the title to personal property of the defendant; and by statute, of course, his power to deal with property is greatly extended, and includes real as well as personal property.[31] Equity is not confined to action on the person. But even if it were, it would not follow that equitable rights are only personal rights. Professor Cook has shown, in a clear and convincing way, that the nature of the right is not determined by the nature of the action by which the right is vindicated; nor by the nature of the judgment or decree rendered in the action; nor by the method of enforcing the judgment or decree.[32]

III. It has been urged that "the duties which correlate with rights *in rem* are always negative", and that "the obligations which correlate with the *cestui que trust's* rights are certainly not merely negative" although "some no doubt are negative, but some and most are positive", and that, therefore, the rights of the *cestui que trust* are not rights *in rem*.[33] But even if the premises are correct the conclusion does not follow. So far as the *cestui que trust* has rights against his trustee to which positive duties correlate, the rights are, indeed, *in personam;* but inasmuch as he also has rights to which negative duties correlate, he may certainly

[31]See Huston, Enforcement of Decrees in Equity, ch. 5.

[32]The Powers of Courts of Equity, 15 Columbia Law Rev. 37, 106, 228.

[33]Hart, The Place of Trust in Jurisprudence, 28 Law Quarterly Review, 290, 296.

have rights *in rem.* The trustee may owe a positive duty to invest the trust property; that duty does not rest upon the rest of the world. He may owe a negative duty to refrain from competing with the *cestui que trust* with respect to the trust *res;* that duty, since it is imposed on the trustee because he is a fiduciary, does not rest on the rest of the world. But the negative duty to refrain from using the trust property for any purpose inconsistent with the purposes of the trust is a duty which does rest upon the "world at large".

IV. It is of course a fundamental doctrine of the law of trusts that one who without notice of the claims of the *cestui que trust* obtains from the trustee a transfer of the trust *res,* takes the trust *res* free and clear of the trust. Now, it has been insisted that the fact that a *bona fide* purchaser takes free and clear of the trust conclusively proves that the right of the *cestui que trust* is a purely personal right against the trustee. Thus Professor Langdell says, "The moment it [the trust *res*] reaches a purchaser for value and without notice, equity stops short; for otherwise it would convert the personal obligation into a real obligation, or into ownership"; and again, conversely, "If equitable rights were rights *in rem,* they would follow the *res* into the hands of a purchaser for value and without notice".[34] And Professor Ames is no less firm on this point: "A trust, as every one knows, has been enforceable for centuries against any holder of the title except a purchaser for value without notice. But this exception shows that the *cestui que trust,* unlike the bailor, has not acquired a right *in rem.*"[35] Now Professor Huston, it is submitted, has clearly shown the unsoundness of this argument. He mentions nine or ten classes of cases in which either at common law or by statute a legal title is cut off by a transfer to a *bona fide* purchaser without the owner's consent.[36] But the possibility of losing his interest in the property does not reduce his ownership, while it continues, to a mere obligation. If a statute should provide that legal ownership should be cut off by a sale of property to a *bona fide* purchaser by anyone in possession, one would hardly contend that before such a sale takes

[34]Brief Survey of Equity Jurisdiction (2nd ed.) 6.

[35]Lectures on Legal History, 76. So also Hart, The Place of Trust in Jurisprudence, 28 Law Quarterly Review, 290, 297: "His right ought to be regarded as *jus in personam,* since, although it can be enforced against a great many people, it cannot be enforced against everybody."

[36]Enforcement of Decrees in Equity, 124-5.

place the fundamental nature of legal ownership is changed and that it becomes a mere personal right.

But although it is conceived that Professor Langdell and Professor Ames were not justified in insisting that the fact that a purchaser for value and without notice takes free and clear of the trust demonstrates the proposition that the rights of the *cestui que trust* are merely rights *in personam,* yet the cases do support their contention that, as a matter of legal history, equity refused to give relief because it was felt that in point of justice the claims of the two contestants, the *cestui que trust* and the purchaser, are equal, and that, therefore, there is no reason for a court of equity to interfere to change the *status quo.* But Professor Ames seems to go too far when he says that a decree against an innocent purchaser who has acquired the legal title to a *res* would be "obviously unjust."[37] It does not seem affirmatively unjust to allow a recovery. The rule of law which allows an action of trover against a *bona fide* purchaser from a converter of a chattel is not unjust; and yet from the point of view of morals such a purchaser is as pure as a purchaser from a trustee. It would seem rather that equity being a court of conscience refused to give a remedy unless there was an affirmative reason in point of justice for giving the remedy and that such reason is lacking in a case where both parties are equally innocent. The attitude of the Chancellor is purely negative; he simply leaves the parties where they are; he simply refuses to deprive Peter to pay Paul.[38] The doctrine of the *bona fide* purchase of trust property cannot be explained or understood apart from its history. And the great contribution to the subject made by both Professor Langdell and Professor Ames lies in their insistence on the fact that while the law has regarded chiefly the right of the plaintiff, equity has laid stress upon the duty of the defendant;[39] that just as the character of the substantive common law has been molded by the common law forms of action, so the distinctive character of equity jurisprudence has been chiefly due to the nature of equitable remedies. The reason for the refusal to give relief against a *bona fide* purchaser was as a matter of history based on considerations of conscience rather than on

[37]Lectures on Legal History, 76.

[38]Ames, Lectures on Legal History, 385.

[39]Ames, Lectures on Legal History, 444.

economic policy.[40] But doubtless in the back of the minds of the equity judges considerations of economic expediency have had force. If the doctrines based on conscience had not been commercially expedient, they could not well have survived. And the doctrine of *bona fide* purchase lives today because experience has in truth proved it to be commercially expedient. And although the doctrine was worked out quite independently of legal analogies, yet there are similar doctrines in the law, with different origins and different developments, whereby one person is given power to cut off another's rights without that other's consent. For this reason and to this extent it seems that Professor Huston is right when he suggests that the equitable doctrine of *bona fide* purchase is but one example of a larger doctrine which "runs through the whole fabric of modern law:—an effort to ensure security in commercial transactions and acquisitions by imposing certain responsibilities on owners of property with respect to that property as a price of legal protection to their interests in it."[41]

It would seem, therefore, that none of the four reasons which have been offered as proving that the right of the *cestui que trust* is only an obligation is sufficient to demonstrate that proposition. Let us now consder the questions as to who are bound by the trust, and as to the reasons for so binding them. It will be convenient to consider *first,* the transferee with notice of the trust; *second,* the transferee who pays no value; *third,* the overlord taking by escheat; and *fourth,* the disseisor or converter.

I. When uses were first enforced by the Chancellor, they were enforced only against the original feoffee and against transferees who expressly agreed to hold subject to the use. At that time the *cestui que use* certainly had no rights in the nature of ownership; he had only rights *in personam.*[42] But subsequently the Chancellor gave a remedy against a person who takes from the trustee with notice of the trust. Why this extension? It has been suggested that it can be explained on the theory of unjust enrichment.[43] But

[40]Conceivably the common-law judges might have refused to allow the bailor to recover in detinue against a *bona fide* purchaser, as they did refuse it against a purchaser in market overt. But this would have involved a weighing of ethical considerations altogether foreign to the medieval method of thought." Ames, Lectures on Legal History, 76.

[41]Enforcement of Decrees in Equity, 127-128. See also Professor Pound, in 26 Harvard Law Rev. 462.

[42]The doctrine of Lumley *v.* Gye (1853) 2 E. & B. 216, had not yet arisen.

[43]Ames, Lectures on Legal History, 382.

surely it is arguing in a circle to say that he takes subject to an equitable interest because he pays less than he would pay if he took free and clear of that interest; for if he does take free and clear of the equitable interest he is willing to pay as much as if the property had never been subject to any equity.[44] The fact seems to be that the remedy was originally given because the transferee was regarded as acting unconscionably, as colluding with the trustee in a breach of trust; and equity imposed upon him an obligation to make specific reparation for the breach of trust, just as it would compel the trustee himself to make specific reparation if it should come to be within his power to do so by reacquiring the trust property.

But this explanation of the reason for subjecting a purchaser to equities of which he has notice does not take care of some kinds of equities to which a purchaser is now subjected. In the case of a purchaser with notice of a restrictive covenant, for example, it seems impossible to base a suit upon any such idea. The covenantor does no wrong in selling the property to one who has notice of the covenant, and the purchaser does no wrong in buying the property. If the purchaser subsequently violates the covenant, he and he alone is liable.[45] Why is he liable? There seems to be no adequate reason except that equity regards the covenant as giving the owner of the property to be benefited an equitable interest in the burdened property analogous to a legal easement.[46] It is only by following this analogy that a case like *London County Council* v. *Allen*,[47] can be justified. That case held that a restrictive covenant will not bind an assignee with notice unless the covenant was made for the benefit of some "dominant" land.[48] The only adequate explanation of the situation is that there is a property inter-

[44]Of course the trustee might be willing to take somewhat less than he could get in an open market because he will naturally desire to be secretive in making the sale.

[45]See Sexauer *v.* Wilson (1907) 136 Iowa 357, 113 N. W. 941.

[46]But see Ames, Lectures on Legal History, 384 *et seq.*

[47][1914] 3 K. B. 642.

[48]The same thing may be said of the cases of affirmative covenants. Haywood *v.* Building Society (1881) 8 Q. B. D. 403. But see the explanation in Ames, Lectures on Legal History, 383. Compare also the holding in London & S. W. Ry. *v.* Gomm (1882) 20 Ch. D. 562, to the effect that a restrictive covenant creates an interest in property within the meaning of the Rule against Perpetuities; and cases like Flynn *v.* New York etc. Ry. (1916) 218 N. Y. 140, 112 N. E. 913, allowing compensation to the dominant owner when the servient land is taken on eminent domain. *Contra*, Doan *v.* Cleveland Short Line Ry. (1915) 92 Ohio St. 461, 112 N. E. 505. See 21 Harvard Law Rev. 139.

est created; but that since it is an equitable property interest it may, like all equitable interests, be cut off by a sale to a purchaser for value without notice.

It has been held that if the trustee sells property to one who has notice of the trust and then repents of his breach of trust, he may, without joining the *cestui que trust,* bring a suit in equity against the transferee to set aside the transfer and recover the trust property.[49] And of course if he has a right to bring such a suit, the *cestui que trust* may compel him to do so. But if the trustee is barred by the Statute of Limitations or by laches from bringing such a suit, then the *cestui que trust* cannot reach the trust property through him. Now, suppose the *cestui que trust* has been under a disability. Has he lost all his interest in the trust property because of the failure of his trustee to sue? And is he relegated to a mere claim against the trustee for breach of trust? It would be extremely unfair thus to deprive him of the trust property by a collusive arrangement between the trustee and the transferee. Whatever view is taken as to the nature of the interest of the *cestui que trust,* there is no reason to deprive him of it.[50] If he is regarded as equitable owner of the property, he certainly should not be barred until the Statute of Limitations has run against him, or until he is barred by his own laches. On the other hand, even if his right is a merely personal right, a duty is imposed upon the transferee to make specific reparation for the wrong that he has done by colluding in the breach of trust. But what form should this reparation take? The transferee should hold in constructive trust. For whom? The constructive trust should be raised in favor of the *cestui que trust,* since it is he and he alone who was wronged by the breach of trust; it is the duty of the transferee to surrender the trust property to him, or to a new trustee appointed to hold for him, rather than to the fraudulent trustee; and the *cestui que trust* has a direct right of his own against the purchaser and may sue him in equity (joining the trustee as a party simply because his presence is necessary to a complete determination of the controversy) and recover the trust property; and if the repentant fraudulent trustee is given a right to sue alone and recover the trust property, that is merely a convenient alternative remedy. Therefore,

[49]Wetmore *v.* Porter (1883) 92 N. Y. 76.

[50]See Elliott *v.* Landis Machine Co. (1911) 236 Mo. 546, 139 S. W. 356, approved 11 Columbia Law Rev. 686; *contra,* Willson *v.* Trust Co. (1898) 102 Ky. 522, 44 S. W. 121, criticised in 12 Harvard Law Rev. 132.

whichever view is taken as to the nature of the rights of the *cestui que trust,* he should not be barred merely because the fraudulent trustee is barred.

II. Equity after some hesitation came to give a remedy against a transferee of land subject to a use who had no notice of the use, but who gave no value. The reason given in the early cases for compelling the donee to surrender the land was that a donee is presumed to have notice of the use. Now, of course, that is a pure fiction.[51] Even Professor Langdell employs this fictional mode of explaining the rule that an innocent donee takes subject to a trust: "If he [the transferee] paid nothing for the property (*e. g.,* if he received it as a gift, or in payment of a debt, or upon credit), the law will imply notice against him, and thus establish privity".[52] Professor Ames repudiates this idea and offers a less artificial and more reasonable explanation. He bases the right of the *cestui que trust* against the donee on unjust enrichment. He says that although the acquisition was honest, retention after notice of the trust is dishonest.[53] This reason justifies the court in subjecting to the trust those who take the trust property or an interest in the trust property by operation of law, as heirs, personal representatives, special occupants, wives, husbands, and creditors claiming under an attachment or execution or under the lien of a judgment, all of whom were finally subjected to the trust. But does not this reason necessarily involve a recognition that the *cestui que trust* has an interest in the property? Otherwise, how can it be said that the donee is enriched at the expense of the *cestui que trust?* The courts, speaking of conscience, of presumed notice, of unjust enrichment, may not always have recognized the implications of their decisions, but it seems that none the less the subjection to the trust of persons who have taken without notice, but who have paid no value, involves a recognition of a proprietary right in the *cestui que trust.*

[51]The application of this fiction would have led to a different result from that reached by the court in the case of Giddings *v.* Eastman (N. Y. 1836) 5 Paige 561. In that case an innocent donee of a fractional interest in property subject to a trust subsequently purchased in good faith and for value another fractional interest. It was held that he took the first interest subject to the trust, but the interest subsequently acquired he took free and clear.

[52]Summary of Equity Pleading (2nd ed.) 211. Of course this reasoning is not applicable to those who take by operation of law against whom, therefore, equity at first declined to give relief.

[53]Lectures on Legal History, 255.

III. If a trustee of an estate in fee simple dies without heirs, it has been held that the overlord who takes by way of escheat takes free and clear of the trust. The situation was treated as analogous to that in which a trustee holds an estate for his life; the trust ends when the *res* ends, for surely the remainderman is not subject to the trust. It was also treated as analogous to the case in which a trustee has only a tortious title and is ousted by the true owner, who surely is not subject to the trust. But are the analogies sound? After all, is the situation like that of a life estate or a tortious estate held in trust? A fee simple happens to be the largest estate known to the law and so far as the *cestui que trust* is concerned its coming to an end by way of escheat is a mere accident; the trustee, by a devise, might have prevented the overlord from taking by escheat; but a trustee of a life estate cannot cut out the remainderman, nor can a trustee of a tortious estate cut out the true owner. If unjust enrichment is the basis of the right of the *cestui que trust,* it is clear that the overlord ought not to profit by an accident at the expense of the *cestui que trust,* and if the *cestui que trust* is regarded as equitable owner of the property, there is no more reason for cutting off his ownership than there is for cutting off legal interests created by a tenant in fee simple, such as leases, rent charges, easements and the like, subject to which the overlord takes when he comes in by escheat.[54] There is no necessity of "privity"; it is not fatal to the *cestui que trust* that the overlord takes in the *post;* whatever reasons justify the imposition of a trust upon a transferee who gives no value are applicable to a case of escheat.[55]

IV. Again the case of disseisin and conversion has offered difficulties. What are the rights of the *cestui que trust* of land against one who has disseised the trustee, or of the *cestui que trust* of personalty against one who has converted the trust property? Undoubtedly here a legal wrong is done to the trustee and he may maintain an action at law; and in this action the *cestui que trust* of course need not and cannot join as a party plaintiff, for no *legal* wrong has been done to him. Undoubtedly the *cestui que trust* can compel the trustee to bring an action at law against the disseisor or converter. But has the *cestui que trust* in addition

[54]Hardman, The Law of Escheat, 4 Law Quarterly Review, 318, 329.

[55]The *cestui que trust* is now protected in England by statute. Where allodial ownership is substituted for tenure the *cestui que trust* is of course protected.

any direct right against the wrongdoer? Is he barred of all remedies for the recovery of the property when the trustee is barred, even if he, the *cestui que trust,* has been under a disability? Three reasons may be offered for denying him a direct right. *First,* it has been contended that no trust should be imposed upon the disseisor or converter because the trust attaches only to the old title, and the disseisin or conversion gives a new title to the disseisor or converter; there is no "privity" between the trustee and the disseisor or converter. *Second,* it has been suggested that there is a policy which demands that the title to property should be tried only in an action at law. *Third,* it has been suggested that the *cestui que trust* is represented by the trustee and that there is, therefore, no need to give him a direct right of his own against the wrongdoer.[56]

In order to test the sufficiency of these reasons, let us consider the case of a restrictive covenant. Here only the first of the three reasons has any applicability. The title to property is not involved. The owner of the "servient" estate in no sense represents the person entitled to the benefit of the covenant; the latter cannot compel him to oust the disseisor, as the *cestui que trust* can compel his trustee to do. Hence it is clear that if the person entitled to the benefit of the covenant is to have any right at all after the disseisin, it must be a direct right against the disseisor. The question is, therefore, whether the lack of "privity" is fatal; whether the acquisition of a new title by the disseisor cuts off the equity of the person entitled to the benefit of the restrictive covenant. It has been held that it does not; that the equity persists and that it is available although by the expiration of the period of the Statute of Limitations, the disseisor has acquired an indefeasible title.[57] Professor Ames was willing to support the case on the ground of unjust enrichment.[58] The easiest explanation however is that the right created by the restrictive covenant is analogous to a legal easement. It is an equitable property right. It continues until it is

[56]This third reason, but not the first or second, might be given for refusing to allow the *cestui que trust* a direct right against one who, without ousting the trustee, injures the trust *res,* or against one who by fraud induces the trustee to sell the *res* under a power of sale.

[57]*In re* Nisbet and Potts' Contract [1905] 1 Ch. 391, affirmed [1906] 1 Ch. 386. This decision is vigorously criticised by T. Cyprian Williams in 51 Solicitor's Journal, 141, 155; but it is submitted that the criticism is unsound.

[58]Lectures on Legal History, 385. Professor Ames, it may be remarked, unlike Professor Langdell, Summary of Equity Pleading (2nd ed.) 211, never talked of the necessity of "privity."

barred by adverse usér, or, since it is an equitable interest, until the property comes into the hands of a purchaser for value and without notice. Here again as in the case of escheat, the situation is different from that which arises when the third person comes in either as a remainderman or under an elder title.

To return to the question of trusts. If the *cestui que trust* is denied a direct right against a disseisor or converter, it is not because of the lack of privity, it is not because a new title has been acquired, for if the acquisition of a new title were sufficient to cut off equities, restrictive covenants would be cut off. If the *cestui que trust* is denied a direct right against the disseisor or converter, with the result that he is barred when the trustee is barred, it is either on the ground of a supposed policy against bringing the legal title into question in a court of equity, or on the ground that the trustee represents the *cestui que trust.* Are these reasons sufficient? Admittedly if the trustee should refuse to bring an action at law against the disseisor or converter, the *cestui que trust* might bring a suit in equity against the trustee to compel him to proceed against the disseisor or converter, and in order to prevent multiplicity of suits he might join the disseisor or converter as a party defendant with the trustee, and the question of the legal title would then be determined in equity, or an issue could be framed for trial by a jury at law. The problem is no different when the *cestui que trust* asserts a direct right against the disseisor or converter. The other reason, namely, that the trustee represents the *cestui que trust,* is the only substantial reason for denying the *cestui que trust* a direct right against the disseisor or converter; but in answer to it, it may be said that the trustee who refuses or neglects to proceed against the wrongdoer does not properly and adequately represent the *cestui que trust.*[59] At any rate, neither of these grounds is sufficient to bar the *cestui que trust* if the

[59]For one or the other of these reasons the weight of authority denies the *cestui que trust* a direct right against the disseisor or converter, and bars the *cestui que trust* when the trustee is barred, even though the *cestui que trust* was under a disability or had a future equitable interest. See for instance Lord Compton's Case (1586) 4 Leon. 196; Earl of Worcester *v.* Finch (1601) 4 Coke, Inst. 85; Lewellin *v.* Mackworth (1740) 2 Eq. Ca. Ab. 579; Colburn *v.* Broughton (1846) 9 Ala. 351; Hall *v.* Waterman (1906) 220 Ill. 569, 77 N. E. 142; Crook *v.* Glenn (1868) 30 Md. 55; Kirkman *v.* Holland (1905) 139 N. C. 185, 51 S. E. 856; Cameron *v.* Hicks (1906) 141 N. C. 21, 53 S. E. 728; Young *v.* McNeill (1907) 78 S. C. 143, 59 S. E. 986; Appel *v.* Childress (1909) 53 Tex. Civ. App. 607, 116 S. W. 129. See 1 Ames, Cases on Trusts (2nd ed.) 254, n. 1, 372, n. 1; Huston, Enforcement of Decrees in Equity, 142. These cases are to be distinguished from those in which the trustee has made a conveyance to one who has notice of the trust, or to a donee. See *ante* p. 283.

trustee gratuitously releases the disseisor or converter.[60] Here clearly there is no policy against allowing a suit in equity, for only in equity can relief be given. The trustee certainly does not represent the *cestui que trust* any more than he represents him when he transfers the property in breach of trust to a purchaser with notice or to a donee. The only ground for denying him a direct right in equity against the disseisor or converter would be that a new title has been acquired. But it has been shown that is not a sufficient ground for cutting off the rights of the *cestui que trust*.[61]

The true nature of the rights created can best be observed and tested from a distance. The cases in which the problem of the nature of the rights of the *cestui que trust* becomes of vital moment are those involving questions of the conflict of laws. Whether an obligation is created depends upon the law of the place where the act is done from which the obligation is supposed to arise; whether an interest in land is created depends upon the law of the *situs* of the land. So far, therefore, as the rights of the *cestui que trust* are merely personal rights their creation is governed by the law of the place where the attempt is made to create them; so far as they are property rights, in the case of land at least, their creation is governed by the law of the *situs* of the property. Professor Beale has discussed this matter very fully. He says: "Looked at from within, the equitable interest is sharply contrasted with the legal; but viewed from without, the legal owner and the beneficiary are both alike persons who have claims, large or small, upon the land. . . . The law, then, treating equitable interests in land in this respect like legal interests, holds that such interests are governed by the laws of the *situs*. Thus the question whether a trust in land exists in favor of a certain claimant will in every court be determined as in the court of the *situs*. If by the law of the *situs* the transaction in question created a valid trust, the trust will be recognized in the courts of the *situs;* and it will be

[60]Nor in the case where a trustee of an estate for life or years forfeits the estate by making a tortious feoffment, nor in the case where he makes a surrender. See Saunders *v.* Allen (1679) Finch, 424; Duke, Charitable Uses, 161. In these cases there is no privity of title, for the trust *res* is destroyed. But the *cestui que trust* should have a right against the remainderman or surrenderee.

[61]Professor Ames would allow the *cestui que trust* to hold the disseisor or converter in a case like this. "Release of right *in rem* to disseisor extinguishes it—use grafted on right in *rem* disappears also. Today disseisor would be made constructive trustee." MS. note to Lord Compton's Case, 1 Ames, Cases on Trusts (2nd ed.) 370.

recognized equally in the court of another country, though the law of the forum would not create a trust under the circumstances, and even though by the law of the forum the creation of equitable interests is forbidden. On the other hand, if by the law of the *situs* the transaction did not create a valid trust, a trust will not be held to exist either in the courts of the *situs* or even in another state where the law would have created a valid trust as a result of the transaction."[62]

Both obligations and property rights may be created by the same transaction. Thus an agreement to convey land or to mortgage land may create an obligation, and also an interest in the land; whether such an obligation is created depends upon the law of the place where the agreement was made; whether the agreement results in giving a property right to the buyer or mortgagee depends upon the law of the place where the land is situated.[63] Now if by the law of the *situs* a declaration of trust of land or transfer of land in trust is not sufficient to pass the beneficial interest, or is against the policy of that law, the *cestui que trust* acquires no interest in the land.[64] Whether as a result of a declaration or transfer which is ineffective to create any interest in the land any personal obligation is imposed upon the intended trustee, depends upon whether the law of the jurisdiction in which the declaration or transfer is made imposes a personal obligation when no trust is created in the land. Under the Anglo-American law of trusts it is probably true that if the declaration of trust or transfer in trust is insufficient to create a trust in the property none of the personal obligations imposed upon a trustee will be created. The imposition of those obligations is dependent upon the creation of a trust in the property.[65]

The cases which seem especially important in their bearing on

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[62]Beale, Equitable Interests in Foreign Property, 20 Harvard Law Rev. 382.

[63]*Ex parte* Pollard (1838) Mont. & C. 239 (deposit in England, as security, of title deeds to land in Scotland). If, however, the specific enforcement of the obligation would be *brutum fulmen* because effect would not be given to it in the jurisdiction where the land lies, it will not be specifically enforced. The case of Bank of Africa, Ltd. *v.* Cohen [1909] 2 Ch. 129 may be supported on this ground.

[64]Peabody *v.* Kent (1912) 153 App. Div. 286, 138 N. Y. Supp. 32. For a converse case, see Arbury *v.* De Niord (1915) 152 N. Y. Supp. 763.

[65]Whether if no valid trust in the property is created, the subsequent retention of the property gives any rights to the settlor or to the *cestui que trust* depends upon the law of the place where the property is retained. Where the Anglo-American law of trusts prevails, a constructive trust is usually imposed upon the intended trustee where the trust fails.

the nature of the rights of the *cestui que trust* arise when in a jurisdiction in which trusts are allowed, a trust is declared of land situated in a jurisdiction in which trusts are not allowed, and the land is then transferred to one who has notice of the declaration of trust. The cases are agreed in holding that in such a case the transferee takes the property free and clear of the claims of the *cestui que trust*.[66] These cases show that the reason why a purchaser with notice of a trust takes subject to the trust is that the *cestui que trust* has a property interest in the trust *res*; and if by the law of the *situs* he acquires no such interest, the reason for holding the transferee breaks down. They show that although the *cestui que trust* may have personal rights against the trustee, he cannot hold the transferee unless he has property rights in the trust *res*; that it is only so far as the equitable interest is a property right that transferees take subject to it.[67]

SUMMARY.

It has been shown that the creation of a trust has always been regarded as a legal transaction quite different in its nature from the creation of an obligation. It has been shown that the rights of the *cestui que trust* in respect to their duration, transmission and alienation are treated like property rights rather than like obligations. It has been shown that the reasons usually urged as proving that the rights of the *cestui que trust* are obligations and not property rights do not establish that proposition; the *cestui que trust* may be beneficial owner though the trustee is legal owner; the nature of equitable remedies is not conclusive as to the nature of equitable rights; the fact that the trustee has some positive or affirmative duties is immaterial; and the fact that a

[66]Martin *v.* Martin (1831) 2 Russ. & M. 507 (marriage settlement in England of land in Demerara); Norris *v.* Chambres (1861) 29 Beav. 246, affirmed (1861) 3 DeG. F. & J. *583 (contract in England to sell land in Prussia). Compare Fall *v.* Fall (1905) 75 Neb. 104, 106 N. W. 412, affirmed *sub nom.* Fall *v.* Eastin (1909) 215 U. S. 1, 30 Sup. Ct. 3 (equitable decree in Washington ordering conveyance of land in Nebraska).

[67]"If land in a common law state subject to an equitable claim is sold to a purchaser with notice, he is bound to respect the equity. But this is because he takes the land subject to the other's equitable right; and if by the law of the situs there is no equitable right in the land, the purchaser cannot be subjected to a claim on the part of the asserted beneficiary, even though he would be held a trustee if the land were in the state of forum." Beale, Equitable Interests in Foreign Property, 20 Harvard Law Rev. 382, 390.

purchaser for value without notice takes free and clear of the trust is likewise immaterial. It has been further shown that the most obvious if not the only adequate explanation of the subjection to equities of a purchaser with notice and a donee, and, to the extent to which they are held, an overlord taking by escheat and a disseisor or converter, is that the *cestui que trust* is equitable owner of the trust property. Finally it has been shown that in the cases where a different body of law governs the creation of obligations from that which governs the creation of property rights, it is the latter rather than the former which determines whether or not a trust of land is created, and the extent to which duties are imposed upon third persons with respect to the land. The writer's contention is that today it is correct to say that the *cestui que trust* has two classes of rights; he has a number of rights, positive and negative, available against the trustee alone; he has in addition, as equitable owner of the trust *res,* a right against the world at large to insist that it respect his ownership, to insist that it refrain from using the trust property for any purpose which is inconsistent with the trust; that right is not available against a purchaser for value and without notice; and if, unlike some equitable interests, it is not available against one who acts adversely to the trustee, as a disseisor or converter, it is not because equity does not regard the *cestui que trust* as beneficial owner of the trust *res,* but because it considers that the trustee adequately represents him. The function of the double ownership is clear. The trustee is a buffer between the *cestui que trust* and the world; as against the rest of the world he has the rights of an owner, and he has the duties of an owner; but these rights he holds for the benefit of the *cestui que trust,* and the burden of these duties he can, by the aid of a court of equity, shift to the trust property and even, in some cases, to the *cestui que trust* himself.[68] But when it is necessary for the protection of the *cestui que trust,* equity will recognize that he is in very truth beneficial owner of the trust property.

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[68]See the writer's article, Liabilities Incurred in the Administration of Trusts, 28 Harvard Law Rev. 725.